

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF THE REQUEST BY  
BRUSCO CORPORATION FOR TEMPORARY  
MODIFICATION OF WATER QUALITY  
CRITERIA

BRUSCO CORPORATION INC.,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 86-115

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

THIS MATTER, the appeal of a temporary modification of water quality criteria granted by the State Department of Ecology to Brusco Corporation Inc., came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Wick Dufford and Judith A. Bendor, Members, convened at Lacey, Washington on November 24, 26, and December 1, 1986. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

1 Appellant appeared by his attorney, Vernon J. Guinn. Respondent  
2 appeared by Allen T. Miller, Jr., Assistant Attorney General. Eugene  
3 Barker and Associates provided court reporting services.

4 Witnesses were sworn and testified. Exhibits were examined. From  
5 testimony heard and exhibits examined, the Pollution Control Hearings  
6 Board makes these

#### 7 FINDINGS OF FACT

##### 8 I

9 This matter arises in Grays Harbor County and concerns a proposal  
10 to salvage sunken logs from the bottom of Grays Harbor, the Chehalis  
11 River and connecting sloughs.

##### 12 II

13 Log salvage is a commercial enterprise which has long been a part  
14 of the forest industry in Washington. The objective is to recapture  
15 abandoned logs which are still usable for forest products and to sell  
16 the logs to a forest product manufacturer.

##### 17 III

18 Log salvaging is regulated as a business, by state statute  
19 entitled "Log Patrols", 76.40 RCW, enacted in 1947 and still in  
20 effect. The statute was last amended in 1984.

##### 21 IV

22 Appellant, Brusco, Inc., is a family business. The Brusco family  
23 has salvaged logs in Washington since 1947. During the ensuing 39  
24 years the Bruscos have salvaged logs on the Columbia River and many  
25

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1 tributaries and connecting sloughs within Washington. The same is  
2 true for Oregon.

3 V

4 In 1985, Brusco, Inc., (Brusco) sought to establish a permanent  
5 base of operations in Grays Harbor County to begin salvaging logs in  
6 that area. To recover sunken logs, Brusco employs a barge-mounted  
7 crane which lowers a steel-jawed pincher on a cable from the crane to  
8 the bottom. By moving the pincher about the bottom in a systematic  
9 pattern, the pincher will eventually bump into a large object. The  
10 crane operator can then take hold of the object with the pincher,  
11 bring it to the surface and, if it is a log, store it on another  
12 barge moored to the crane barge. Brusco employs seven people,  
13 although only one or two may be on the crane barge during operation.  
14 The recovered, usable logs are sold for pulp wood.

15 VI

16 Brusco is licensed by the State Department of Natural Resources  
17 (DNR) under the Log Patrols Act. No other state permits had been  
18 required of Brusco while operating in Washington in or near the  
19 Columbia River. While Brusco was undertaking its first operations in  
20 Grays Harbor, however, district investigators of the State Department  
21 of Game (DOG) and respondent State Department of Ecology (DOE) chanced  
22 to view the operations while on other business. The investigators  
23 developed concern over the water turbidity caused by Brusco. A stop  
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1 work order ensued. Respondent, DOE, then indicated that a written  
2 "short term modification" of the water quality standards of chapter  
3 173-201 WAC would be necessary for the Brusco operation. The DOG also  
4 indicated that a Hydraulics Project Approval under chapter 75.20 RCW  
5 would be necessary.

## 6 VII

7 Brusco responded to the concerns of the agencies by 1) engaging  
8 scientific experts in the areas of water quality and fish biology and  
9 2) filing applications for the water quality modification and  
10 hydraulics approval.

## 11 VIII

12 The Brusco application for short term water quality modification  
13 was filed with respondent, DOE, in May, 1986. The application  
14 proposed log salvage in the mainstream Chehalis River, including all  
15 side sloughs (e.g. Preacher's slough, Blue slough) that have or have  
16 had log storage. The proposal was to extend upstream to Montesano.  
17 The DOE granted the modification, but in doing so limited operations  
18 in part to go no further upstream than Cosmopolis, excluded operations  
19 in the sloughs and required operations to be in at least 20 feet of  
20 water depth. From this, appellant appealed to this Board on July 3,  
21 1986. Although not now before us, the Brusco application for  
22 Hydraulic Project Approval was approved by the State Department of  
23 Fisheries, in cooperation with Department of Game, in June, 1986, with  
24 similar limitations as imposed by DOE. .

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IX

The DOE determined that the proposed action was subject to the threshold determination of environmental significance under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. The DOE then served as lead agency in making this determination. After considering the environmental checklist and other information from Brusco, DOE issued a written determination of non-significance (DNS) on May 9, 1986, and distributed it to other agencies for comment. This DNS, by its terms, applied to the entire Brusco proposal to salvage the Chehalis River and sloughs up to Montsano. The conditions imposed later in DOE's water quality modification (e.g. cease operations at Cosmopolis, no operations in sloughs, and so forth) were, in part, the result of comments to the DNS from agencies concerned with fish resources. However, no other agency with jurisdiction undertook to assume lead agency status and require an environmental impact statement. Moreover, the DNS was neither modified nor withdrawn by DOE, despite the express declaration within the DNS that it applied to both the mainstream and sloughs of the Chehalis River. Likewise, the proposal described in the DNS contained no upstream limitation such as was later imposed by DOE.

X

The basis for DOE's imposition of an upstream limit at Cosmopolis was its concern that there is little information about the river bottom past that point. The DOE did not conduct studies of its own

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1 upstream of that point, but expressed concerns that the Brusco  
2 proposal might 1) significantly reduce dissolved oxygen, 2) cause  
3 harmful turbidity or 3) release volatile solids or heavy metals from  
4 the bottom into the water column. The DOE did not ask Brusco to  
5 submit more information on these matters prior to issuing the DNS.

6 XI

7 Dissolved Oxygen. The Brusco proposal would probably not reduce  
8 dissolved oxygen levels significantly, if at all. The proposal does  
9 not pose any genuine threat to fish or other marine organisms in this  
10 regard.

11 XII

12 Turbidity. Appellant has shown that the turbidity caused by its  
13 operations will likely be of brief duration and small extent.  
14 Turbidity plumes observed in Brusco operations in Grays Harbor  
15 dissipated after 200 feet and were 2 1/2 meters vertical and 3 meters  
16 horizontal in cross section. There is no material difference between  
17 the Grays Harbor sediments and those of the Chehalis River upstream to  
18 Montesano, and therefore similar turbidity would be expected. The  
19 Chehalis river has, presently, one of the highest sediment loads in  
20 Washington. In this context the small turbidity of the Brusco  
21 proposal would have no material adverse effect. The foregoing extends  
22 also to the related sloughs of the Chehalis in the first mile nearest  
23 the river. Operations in water depths of less than 10 feet, however,  
24  
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1 could cause unacceptable turbidity or interference with fish rearing  
2 or refuge. Brusco does not propose to operate in waters less than 10  
3 feet deep.

4 XIII

5 Volatile Solids or Heavy Metals. Appellant has shown that  
6 volatile solids, such as hydrogen sulphide, do not pose a significant  
7 threat of harm in connection with this proposal. Nor is it likely  
8 that heavy metals would pose any threat due to the low metal  
9 concentrations found in the vicinity of the proposal.

10 XIV

11 The logs which would be removed under the proposal may have a  
12 limited value as cover for protection for fish. However, the bottom  
13 directly under the logs is deprived of oxygen which thereby deprives  
14 the fish of food species which would be available otherwise. The net  
15 long term effect of removing the logs would be beneficial, in that the  
16 limiting factor upon fish population in the Chehalis River is food and  
17 not cover. When a log is removed from the bottom, food species will  
18 re-generate in the bottom which the log had been covering.

19 XV

20 Birds, particularly purple martins, perch upon the piling in the  
21 area in question which appear to provide wildlife habitat worthy of  
22 protection.

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XVI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

SEPA. The respondent, Department of Ecology, has taken the position at hearing that an environmental impact statement should be prepared for this proposal. We disagree. We note at the outset that DOE has issued a declaration of non-significance (DNS) for the Brusco proposal which, by its terms, relates to the entire proposal, not the proposal as limited by the water quality modification issued later by DOE. While the responsible official within DOE apparently believed that the DNS could be characterized as a mitigated DNS, that is not the case. This is so because a mitigated DNS comes into being only when the applicant, in this case Brusco, consents to clarify or change features of the proposal. WAC 197-110-350(2) and (3).<sup>1</sup>

- 
1. (2) After submission of an environmental checklist and prior to the lead agency's threshold determination on a proposal, an applicant may ask the lead agency to indicate whether it is considering a DS. If the lead agency indicates a DS is likely, the applicant may clarify or change features of the proposal to mitigate the impacts which led the agency to consider a DS likely. (Continued on page 9)

1        Brusco was not requested to change its proposal prior to the  
2        DNS, nor did it do so. The unilateral imposition of conditions  
3        by DOE in its water quality modification, issued after the DNS,  
4        does not create a mitigated DNS.

5        We therefore conclude that the DNS issued by DOE applied, as  
6        its terms indicate, to the entire Brusco proposal. This DNS may  
7        only be withdrawn under WAC 197-11-340(3)(a) which requires a  
8        showing of one of the following:

9        (1) There are substantial changes to a proposal so that the  
10        proposal is likely to have significant adverse environmental  
11        impacts;

12        (11) There is significant new information indicating, or  
13        on, a proposal's probable significant adverse environmental  
14        impacts; or

15        (111) The DNS was procured by misrepresentation or lack of  
16        material disclosure; . . .

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17        The applicant shall revise the environmental checklist as  
18        may be necessary to describe the clarifications or changes.  
19        The lead agency shall make its threshold determination based  
20        upon the changed or clarified proposal. If a proposal  
21        continues to have a probable significant adverse  
22        environmental impact, even with mitigation measures, an EIS  
23        shall be prepared.

24        (3) Whether or not an applicant requests early notice under  
25        subsection (2), if the lead agency specifies mitigation  
26        measures on an applicant's proposal that would allow it to  
27        issue a DNS, and the proposal is clarified, changed, or  
28        conditioned to include those measures, the lead agency shall  
29        issue a DNS. (Emphasis added).

1 Here there has been no showing of substantial changes in the  
2 proposal and (i), above has not been met. This is a private project  
3 on which a non-exempt <sup>2</sup> license has been issued in the form of both  
4 this water quality modification and the hydraulics approval. For that  
5 reason, (ii), above, does not apply. WAC 197-11-340 (3)(b). Even  
6 were (ii) above to apply, however, there has been no showing of  
7 significant new information on any probable significant adverse  
8 environmental impact. For that further reason (ii) is not met.  
9 Lastly, there has been no showing within this record that any lack of  
10 disclosure during procurement of the DNS was material to the threshold  
11 determination, and (iii), above, is not met.

12 We lastly conclude that the record before us indicates that the  
13 proposal will probably not have more than a moderate effect upon the  
14 quality of the environment, and that the DNS issued by DOE should be  
15 affirmed. See Sisley v. San Juan County 89 Wash. 2d 78 (1977). In  
16 sum, the Brusco proposal is consistent with SEPA in that there has  
17 been a correct determination of non-significance, and an environmental  
18 impact statement need not be prepared.

19  
20 2. Brusco urges that its proposed action and licenses issued by  
21 agencies (e.g. log patrol license, the water quality modification  
22 before us, and hydraulics project approval) are all categorically  
23 exempt. Its reasoning is that log patrol licenses are listed in  
24 Part Nine of the SEPA regulations at WAC 197-11-830(4).  
25 Elsewhere, Brusco points out that WAC 197-11-305 declares that if  
26 a proposal fits within any of the provisions of Part Nine it is  
27 categorically exempt from the SEPA threshold determination  
requirement. (Continued on page 11)

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1 II

2 Temporary Water Quality Modification.

3 A temporary modification of the water quality criteria as  
4 specified in WAC 173-201-035(8)(e) is appropriate to accommodate the  
5 Brusco proposal, and in the same form as granted by DOE, except that  
6 the conditions numbered 1, 2, 3 and 7 should be modified in that each  
7 has been shown to be unduly restrictive.

8 III

9 Term. Condition 1 should be changed to extend the term from  
10 December 31, 1986, to July 31, 1987, to offset time spent in this  
11 litigation. We would endorse a further extension if necessitated by  
12 further litigation. Any interim dates or deadlines should be extended  
13 proportionately.

14  
15 We reject this argument because WAC 197-11-305 which grants  
16 exemption must be read with regard to the make-up of Part Nine.

17 The first section of Part Nine, WAC 197-11-800, lists "proposed  
18 actions" which are categorically exempt. However, subsequent  
19 sections, such as the one listing log patrol licenses, are  
20 characterized by WAC 197-11-810 as relating:

21 " . . . only to the specific activities  
22 identified within the named agencies."

23 We conclude from this that issuance of the log patrol license, per  
24 se, is entitled to exemption under WAC 197-11-830(4) relating only  
25 to the Department of Natural Resources. However, this exemption  
26 cannot wholly contain a proposal such as this one which requires  
27 other licenses from other agencies such as the water quality  
modification of DOE. (Continued on page 12)

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IV

Sloughs. The evidence establishes that there is no difference in the effect of the proposal as to water quality as to any place on the main stem of the Chehalis River or within the first mile from the river up sloughs or tributaries. Condition 2 should be modified accordingly.

V

Depth. The evidence establishes that the proposal would respect fish rearing and refuge requirements and avoid unacceptable turbidity if operations were limited to 10 feet of water depth or more. Condition 3 should be modified from its present 20 foot minimum to a 10 foot minimum.

VI

Upstream Limit. The evidence establishes that there is no material distinction in the effect of the proposal depending upon whether it occurs upstream or downstream of Cosmopolis which is now set by Condition 7 as the upstream limit of operations. Condition 7 should be modified to specify the upstream limit proposed by Brusco which is Montesano.

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Were this not the meaning of the rules, it is difficult to explain the inclusion of forest practices, a major program under which DNR issues permits, within WAC 197-11-800 wherein the entire proposed action is exempt rather than within the list of exemptions specific to DNR, WAC 197-11-830, where log patrol licenses are listed. (Continued on page 13)

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

VII

In summary, Conditions 1, 2, 3 and 7 should be modified to read as follows:

1. Operations may begin immediately up to July 31, 1987.
2. Work will be performed in the mainstream Chehalis River and no further than one mile up connecting sloughs and tributaries.
3. No log salvage or work in water shallower than 10 feet (MLLW = 0.0 feet).
4. The upper limit of operations in the Chehalis River shall be Montesano.

The other conditions as imposed by DOE are appropriate and should be affirmed.

VIII

The regulation of log patrol activity by the device of a temporary modification of water quality is a recent development in a long-standing business. Although water quality criteria have been in place for about 20 years, it is not clear that this form of regulation has occurred previously, or in all areas of the state, with regard to log patrols.

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The logical inference is that a proposal such as forest practices is exempt as to approval by DNR and all other agencies, while a log patrol license is an exempt activity of DNR only and that licenses by other agencies are not drawn into that exemption. Lastly, we would note that should all of this footnote be deemed error the outcome of this case remains the same in any event.

1 A clarification of state policy in this area would seem  
2 appropriate and helpful to those involved in this licensed business.  
3 Nevertheless, we see no impropriety in the application of water  
4 quality criteria in this case, and appellant has shown entitlement to  
5 a temporary modification. Because these modifications are prescribed  
6 as temporary by WAC 173-201-035(8)(e) there should be, as here, a  
7 fixed term for the modification. At this early stage of regulation we  
8 would suggest the term of one year which would allow some continuity  
9 of operations while allowing DOE to revisit the matter at intervals.

10 IX

11 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
12 adopted as such.

13 From these Conclusions of Law the Board enters this  
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26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER

ORDER

Conditions 1, 2, 3 and 7 of the Temporary Modification of Water Quality Criteria are each hereby reversed and the like numbered conditions set forth at Conclusion of Law VII, above, are ordered in lieu thereof. The Temporary Modification is in all other respects affirmed.

DONE at Lacey, Washington, this 5th day of February, 1987.

POLLUTION CONTROL HEARINGS BOARD

Lawrence J. Faulk 1/22/87  
LAWRENCE J. FAULK, Chairman

Wick Dufford  
WICK DUFFORD, Member

(See Dissent)  
Judith A. Bendor, Member

William A. Harrison  
WILLIAM A. HARRISON  
Administrative Appeals Judge

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

1  
2 DISSENTING OPINION: JUDITH A. BENDOR  
3

4 I concur in part with the result, and would allow appellant Brusco  
5 to salvage logs in the Chehalis River up to Montesano. I respectfully  
6 dissent from the majority in part, and would not grant a water quality  
7 variance for log salvaging in the sloughs and tributaries of the  
8 River. That aspect of the case should be remanded back for the  
9 preparation of an environmental impact statement.  
10

11 I

12 In brief, bodies of water and their attendant environments are not  
13 necessarily similar. The majority's opinion is founded on analogizing  
14 among diverse bodies of water, e.g. Grays Harbor, the Chehalis River,  
15 tributaries, and dead-end sloughs, to an extent not supported by the  
16 evidence.

17 II

18 The State of Washington, by statute, is to exercise its powers to  
19 retain and secure high quality for all waters of the state (RCW  
20 90.48.010). The state has divided its waters into classes, reflecting  
21 different quality levels. The waters at issue, here, are primarily  
22 Class A --"excellent" quality--for the Chehalis River above Cosmopolis  
23  
24  
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1 and the related sloughs and tributaries (WAC 173-201-070(6) and WAC  
2 173-201-080(7)).<sup>1</sup> To retain and secure waters' quality, numerical  
3 criteria have been set, such as for dissolved oxygen (WAC  
4 173-201-045). Existing beneficial uses, such as water supply,  
5 recreation, and fish migration are to be maintained and protected,  
6 with no degradation allowed which would interfere with beneficial uses  
7 (WAC 173-201-035(8)(a)).

### 8 III

9 Variances from water quality criteria, such as for dissolved  
10 oxygen, are only to be granted on a short-term basis, "when necessary  
11 to accommodate essential activities, respond to emergencies, or to  
12 otherwise protect the public interest." (WAC 173-201-035(8)(e)).

### 13 IV

14 Log salvaging in the sloughs and tributaries has not been shown to  
15 satisfy these variance requirements. Salvaging is neither an  
16 essential activity nor a response to an emergency. Therefore, the  
17 only remaining regulatory basis for granting a variance is to protect  
18 the public interest. Appellant has not sustained their burden in this  
19 regard.  
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1. Below Cosmopolis the River's waters are Class B --  
23 "good" -- (WAC 173-201-085(11)).  
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V

By way of background, the Chehalis River has a considerable flow of fresh, albeit turbid water. It has been a route for river commerce for many decades. It has been dredged regularly, as recently as 1982, to aid navigation. Removing logs from the River would both improve navigation and provide timber for commercial use. These are public benefits not outweighed by those minimal environmental impacts identified in the record.

VI

In contrast, the sloughs<sup>2</sup> are winding, primarily dead-end water courses. They are not subject to the River's full current and have limited circulation.<sup>3</sup> A few sloughs may have been dredged on a more circumscribed basis, many years ago. Thus the bottom sediments may not have been disturbed for decades.

VII

The sloughs' environments have adapted to the existence of the logs. The upright logs provide nesting and roosting sites for birds.

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2. Almost no evidence was presented at the hearing regarding the tributaries. Appellant has clearly not met their burden with respect to these waters. Hereafter, the dissent will therefore only address the sloughs.

3. The sloughs are subject in varying degrees to tidal influence. Though other than this broad generality, little evidence on the tide's actual effect was presented.

1 The submerged logs provide habitat for migrating, juvenile salmon and  
2 other fish. Dredging for logs would necessarily disturb the  
3 environments.

#### 4 VIII

5 Water quality samples taken in Preacher's and Blue Sloughs, two of  
6 the larger sloughs, show that dissolved oxygen levels are already  
7 below the specified numerical criteria for Class A waters. A log  
8 salvaging operation will disturb bottom sediments, sending them into  
9 the surrounding water. These nutrient-rich sediments are directly  
10 below logs which have been submerged for decades. These bottom  
11 sediments are often anaerobic, without oxygen. When disturbed and  
12 released into the water, they "demand" oxygen. As a result, the  
13 dissolved oxygen levels in the surrounding water would be lowered,  
14 lessening the amount available for fish and other aquatic organisms.

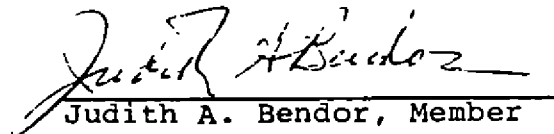
#### 15 IX

16 The turbidity studies which support the conclusion that turbid  
17 plumes caused by the salvaging would be minimal, were in fact done  
18 miles downstream in Grays Harbor near Rennie Island. The only survey  
19 of benthic organisms was done in the Chehalis River itself. The  
20 conclusion that effects on dissolved oxygen levels would be minimal  
21 was based on studies done in Grays Harbor. The conclusion was  
22 admittedly limited to "the reaches of the Chehalis River studied."  
23 (Exh. A-8, Smith Study, July 1986; emphasis added) More expansive  
24  
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1 conclusions at the hearing regarding minimal dissolved oxygen  
2 depression, were primarily based on data in scientific literature  
3 from, again, the waters of Grays Harbor and the River.

4 X

5 In sum, I conclude that the proposed log salvaging operation in  
6 the sloughs and tributaries of the Chehalis River is reasonably likely  
7 to have more than a moderate effect on the environment. Therefore,  
8 the case should be remanded and an environmental impact statement  
9 prepared. Norway Hill Preservation and Protection Association v. King  
10 County Council, 87 Wn.2d 267, 552 P.2d 674 (1976). The proposed water  
11 quality variance to allow log salvaging operations in these backwaters  
12 has not been shown to fulfill the regulatory requirements (WAC  
13 173-201-035(8)(e)), and should not be granted. Were the appellant to  
14 propose a more limited log salvaging operation, essentially a  
15 small-scale pilot operation, another result might be possible.

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18 Judith A. Bendor, Member  
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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF THE  
REQUEST BY BRUSCO CORPORATION  
FOR TEMPORARY MODIFICATION OF  
WATER QUALITY CRITERIA

BRUSCO CORPORATION INC.,

Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 86-115

ORDER DENYING  
RECONSIDERATION

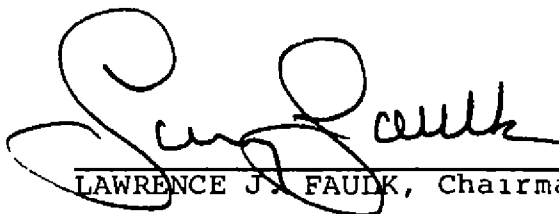
The final decision in the above matter having been mailed on  
February 5, 1987, and

The repondent, Department of Ecology, having timely filed its  
Petition for Reconsideration on February 12, 1987, and

Having considered the Petition and being fully advised  
NOW THEREFORE pursuant to WAC 371-08-200(d) the said Petition is  
denied.

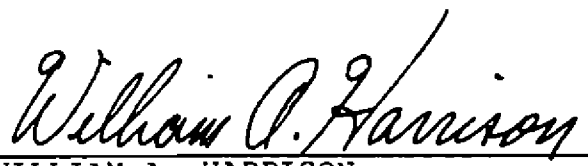
DONE at Lacey, Washington this 23rd day of February,  
1987.

POLLUTION CONTROL HEARINGS BOARD

 2/23/87  
LAWRENCE J. FAUDK, Chairman

  
WICK DUFFORD, Member

(See Dissent)  
JUDITH A. BENDOR, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge

1 DISSENT (BENDOR) Brusco

2  
3 As my previous dissent states, the safeguards of an environment  
4 impact statement are clearly merited in this case. Absent that, the  
5 hearing should be re-opened.

6 Respondent Department of Ecology alleges that recent test results,  
7 which have become available since the hearing, show that fish  
8 migrating through the lower Chehalis River below Montesano survive "at  
9 only 4.5 percent the rate of those that do not have to pass through  
10 this area." (Mills Affidavit at 2, supporting Petition for  
11 Reconsideration).<sup>1</sup> If such alleged facts were proven to be, with  
12 reasonable diligence, newly discovered (Civil Rule 59 (a))<sup>2</sup>, then  
13 the hearing should proceed to take relevant evidence.

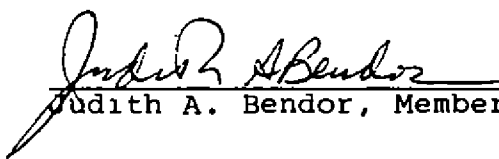
14 If fish were in fact surviving at such a low rate, it would likely  
15 indicate the existence of a highly adverse aquatic environment. In  
16 such a setting, granting a water quality variance might result in  
17 water quality degradation by lowering dissolved oxygen and increasing  
18 turbidity. This could further contribute to elevated mortality.

- 
- 21 1. Affidavits in general are to be viewed with some caution.  
22 They are neither live testimony nor have they been subjected to  
23 the rigors of cross-examination. This affidavit does contain some  
24 ambiguity regarding the survival rate.
- 25 2. For purposes of this analysis, a 4.5% mortality rate is presumed  
26 to be a "fact" sufficiently material to satisfy Civil Rule 59(a).

26 DISSENTING OPINION (BENDOR)  
27 PCHB NO. 86-115

(1)

1 Any increased mortality, where even minimal survival may already be  
2 highly problematic, does not appear to protect the public interest.  
3 See WAC 173-201-035(8)(e). An alleged 4.5% fish survival rate should  
4 surely tip the judicial scales.  
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7 Judith A. Bendor, Member  
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